(9)

No. 93-1551

In the Supreme Court of the United States

OCTOBER TERM, 1994

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER FEDERAL ELECTION COMMISSION

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REPLY BRIEF FOR PETITIONER FEDERAL ELECTION COMMISSION

I. SEPARATION OF POWERS IS NOT VIOLATED BY THE INCLUSION OF NONVOTING *EX OFFICIO* MEMBERS ON THE FEDERAL ELECTION COMMISSION

Neither the Solicitor General nor the Respondents dispute the Commission's showing (FEC Br. 18-20) that the Act denies the Secretary of the Senate and the Clerk of the House any ability to control the exercise of the Commission's executive powers by the six voting Commissioners appointed by the President. Instead, the Solicitor General advocates adoption of a rigid "bright-line rule" (Br. 18, 20) excluding agents of Congress from ever participating even in a purely advisory role in any administrative agency's proceedings. Respondents' primary argument (Br. 14-15) is that a ruling finding this particular statutory scheme to be constitutional would automatically authorize Congress to place its agents at

the President's Cabinet table and in this Court's decisional conferences. We show below that both of these arguments rest upon a rigid view of the separation-of-powers principle inconsistent with this Court's precedents.

1. While acknowledging that there is "nothing illegitimate about efforts by members of one Branch to influence the decisions of the others," the Solicitor General argues that "Congress may not attempt to assert its views from *within* the Executive Branch by creating for its agents positions as members of an agency exercising executive powers" (Br. 19-20, emphasis in original). The Solicitor General relies upon a "bright-line rule" that "Congress may not place its agents as members of a governmental body, even in a non-voting capacity, if that body exercises powers that Congress may not exercise itself" (Br. 18).[1]

As shown in our opening brief (pp. 24-25), this Court has eschewed such "formalistic and unbending rules" in its separation-of-powers jurisprudence. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). *See id.* at 857 ("bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries"). At least in cases like this one, involving the general principle of separation of powers rather than a specific provision in the text of the Constitution, *see Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 484-86 (1989) (Kennedy, J., concurring); *United States v. Frank*, 864 F.2d 992, 1013 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989), the Court's "inquiry is focused on the 'unique aspects of the congressional plan at issue and its practical consequences,'" *Mistretta v. United States*, 488 U.S. 361, 393 (1989) (quoting *Schor*, 478 U.S. at 857).

[1] The Bill of Attainder Clause, U.S. Const. Art. I, § 9, cl. 3, has no application here because the Commission has no authority to impose remedies for civil violations of the Act. To enforce the Act, the Commission must institute a *de novo* civil action in federal district court, 2 U.S.C. §§ 437d(a)(6), 437g(a)(6)(A), and the Justice Department, not the Commission, is responsible for criminal enforcement of the Act. *See* 2 U.S.C. § 437g(a)(5)(C).

The Solicitor General argues (Br. 11-14, 18-19) that the Court should construe the label "member" as giving the Secretary and the Clerk "all the prerogatives of membership not specifically proscribed" (Br. 11), but he has failed to identify any such "prerogatives" beyond the ability, discussed in our opening brief (pp. 18-20), to offer advice on those matters the voting Commissioners discuss at a meeting. Because the statute explicitly denies them the one "prerogative" of membership—a vote—that would allow them to "participate" (Amicus Br. 11-12) in the *exercise* of the Commission's powers, rather than just in discussions, mere designation as "members" does not carry with it even "the *potential* for congressional usurpation of Executive Branch functions" (Amicus Br. 17, emphasis in original). *Cf. Michel v. Anderson*, 14 F.3d 623, 628-32 (D.C. Cir. 1994) (territorial delegates who may debate, but not vote, on the floor of the House are not "members" of the House of Representatives in violation of Art. I, § 2, even though they can vote in committee).[2]

The statute imposes no penalty of any kind that could deter the voting Commissioners from disregarding any advice from the *ex officio* members with which they disagree; it does not require them to explain why they have rejected such advice, to delay their decision until the *ex officio* members can be present to make their comments, or even to discuss a matter during a meeting before voting. *Cf. Hechinger v. Metropolitan Washington Airports Authority*, 1994 WL 520018, *7, *9-10 (D.C.

[2] In *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), a panel of members of Congress was given actual veto power over the Authority's decisions; the Court found the existence of such explicit statutory power to be impermissible even if in practice it "might prove to be innocuous." *Id.* at 277. In this case, by contrast, the statute precludes the Secretary and Clerk from exercising any authority over the Commission's decisions.

Cir., Sept. 27, 1994).[3] Thus, whatever may have been the expectations of some legislators in 1976 when Congress re-established the Commission (*but see* FEC Br. 20 n.11), the Act itself plainly gives the *ex officio* members no leverage to enforce compliance with their views.[4]

There is no dispute here that separation-of-powers principles do not preclude Congress from effectively influencing executive branch decisionmaking through oversight committees, budget restrictions, and even direct discussions with agency decisionmakers.[5] The argument

[3] The lower courts have upheld the requirements in the Competition in Contracting Act that executive decisionmakers delay effectuating contested decisions to provide the Comptroller General an opportunity to give his views and formally report to the Comptroller General if they reject the Comptroller General's advice. *See Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *rev'd en banc on other grounds*, 893 F.2d 205 (9th Cir. 1989); *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988).

[4] It is well-settled, contrary to the Solicitor General's suggestion (Br. 17), that a statute can be implemented narrowly to avoid separation-of-powers concerns. *Public Citizen*, 491 U.S. at 465-66 ("Our reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government"); *Morrison v. Olson*, 487 U.S. 654, 682 (1988) ("it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities . . . and to that end we think a narrow construction is appropriate here"). The restrictions in the Commission's long-standing procedures on the role of the *ex officio* members (FEC Br. 6-7, 19-20) represent an expert construction of the Act that is entitled to deference, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981), even when separation of powers is at issue. *Schor*, 478 U.S. at 844-46.

[5] This has been acknowledged, for example, in decisions upholding "report-and-wait" requirements. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 690 (1987); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1941); *City of Alexandria v. United States*, 737 F.2d 1022, 1026 (Fed. Cir. 1984). *See also* Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d-1 (agency cannot terminate funding

(Amicus Br. 18-20) that the Constitution is violated because designation as "members" permits the Secretary and Clerk to convey their views to the voting Commissioners from "within" the agency fails to give " 'practical attention to substance rather than doctrinaire reliance on formal categories,' " *Schor*, 478 U.S. at 848 (citation omitted). There would be no practical difference in their role if, instead of designating them as *ex officio* "members," Congress had, for example, provided only that "the Secretary and the Clerk may provide the Commission with their expert advice and counsel on any matters discussed at a meeting of the Commission." Just as the integrity of the votes cast by members of the House of Representatives is not compromised by the mere participation in debate by nonvoting territorial delegates, *see, e.g.*, 2 U.S.C. § 25a (District of Columbia); 48 U.S.C. §§ 1711 (Guam and Virgin Islands), 1731 (American Samoa), the decisions of the six voting Commissioners are not tainted merely because they might hear the views of the *ex officio* members. *See Michel v. Anderson*, 14 F.3d at 628-32 (rejecting constitutional challenge to House rule permitting delegates to vote in Committee of the Whole House).

The rule proposed by the Solicitor General should no more be applied to the Commission than to the Sentencing Commission, which includes the Attorney General as an *ex officio* member even though it is located in the judicial branch, *Mistretta*, 488 U.S. at 384.[6] *See*

of party found to have engaged in discrimination until 30 days after submitting a full report to Congress).

[6] There is, for example, no less likelihood on the Sentencing Commission than on the Federal Election Commission that the voting members might treat *ex officio* members "as *colleagues* (rather than as members of a separate Branch of government)" (Amicus Br. 19, emphasis in original). While such speculation about subtle psychological perceptions does not appear to be relevant to assessing the constitutional distribution of governmental powers, we note that the distinct status and lack of authority of the *ex officio*

also 20 U.S.C. §§ 42, 43 (designating Chief Justice of the United States as *ex officio* member of the Smithsonian Institution Board of Regents). If anything, the Attorney General's participation in the Sentencing Commission carries greater potential to influence the actions of one branch to serve the conflicting interest of another branch, for the Sentencing Commission promulgates guidelines that govern the sentencing decisions of federal judges in criminal cases to which the Department of Justice is almost always a party. In *Mistretta*, this Court explicitly noted that assignment to the executive branch of actual authority to promulgate sentencing guidelines might well be an unconstitutional encroachment on the judicial function. 488 U.S. at 391 n.17. Yet the *Mistretta* Court also noted with approval that the Attorney General's *ex officio* membership gave the executive branch greater involvement in the Sentencing Commission than in other independent agencies outside the judicial branch. 488 U.S. at 387 n.14. If there had been a "bright-line" rule equating the persuasive influence possible through *ex officio* membership with unconstitutional control of another branch's actions, the constitutional question the Court found it unnecessary to address in *Mistretta*, 488 U.S. at 391 n.17, would have been directly presented.

This conclusion cannot be avoided, as the Solicitor General urges (Br. 22-23), by arguing that the Constitution is less restrictive of executive encroachment on the judiciary than of legislative encroachment on the executive. Although this Court has closely scrutinized statutes alleged to enhance congressional power because of the legislature's "greater facility" to "mask" such effects "under complicated and indirect measures," *Metropolitan Washington*, 501 U.S. at 274 (quoting The Federalist No. 48, at 333 (J. Madison) (J. Cooke ed. 1961)), the Court has never suggested that the substantive con-

members of he Federal Election Commission is graphically reinforced every time the Commission takes a vote.

stitutional protections against encroachment into another branch's assigned responsibilities are more relaxed for the executive branch than for the legislative.[7]

Proceeding " 'beyond form to the substance of what' Congress has done," *Schor*, 478 U.S. at 854 (citation omitted), the Solicitor General suggests only one way in which the mere presence of the *ex officio* members "threatens to impede the voting Commissioners in the independent exercise of their statutory responsibilities" (Amicus Br. 20). Invoking the traditional rationale for the executive privilege, the Solicitor General argues (Br. 20-21) that the possibility that the *ex officio* members would report to Congress on the Commission's deliberations might chill candid deliberations among the voting Commissioners.

This argument carries little weight in this case because Congress has determined by statute that most of the Commission's deliberations either be conducted in public or be made available to the public after a proceeding is closed. As noted in our initial brief (p. 20), the *ex officio* members are governed by 2 U.S.C. § 437g(a)(12), which precludes "any person" from disclosing any of the Commission's actions in pending enforcement investigations. *See also* 11 C.F.R. §§ 2.4(a), 111.21. Once those administrative investigations are finally closed, audio tapes of most of the Commission's deliberations are made available to any member of the public pursuant to the Government in the Sunshire Act ("Sunshine Act"), 5 U.S.C. § 552b, and/or the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *See* 11 C.F.R. § 2.6. Pur-

[7] Far from suggesting that executive encroachment is less dangerous than legislative, the Court has noted the "dramatic evidence of the threat to liberty posed by a too powerful executive" set out in the Declaration of Independence, and has construed Madison's statement in The Federalist No. 48 as recognizing that "the representatives of the majority in a democratic society, if unconstrained, may pose a similar threat," *Metropolitan Washington*, 501 U.S. at 273.

suant to the Sunshine Act, the Commission conducts its deliberations in most other matters in public session. *See* 11 C.F.R. § 2.3(b).[8] If the prospect of public disclosure has any adverse impact upon the Commission's decisionmaking, these statutes ensure that it would not be altered appreciably by barring the *ex officio* members from the Commission's meetings.

2. Respondents have little to add to the Solicitor General's argument other than hypothesizing (NRA Br. 14-15) that ruling in favor of the Commission here might authorize Congress to place its agents at the President's Cabinet table and in this Court's deliberative conferences. This argument completely disregards this Court's focus on " 'the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions.' " *Mistretta*, 488 U.S. at 383 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). As discussed *supra*, p. 2, the Court has refused to adopt categorical restrictions in this area of the law merely "out of fear of where some hypothetical 'slippery slope' may deposit us." *Schor*, 478 U.S. at 852.

Permitting nonvoting *ex officio* members on the Federal Election Commission clearly would not mean that the Constitution also permits Congress to place its agents in the President's Cabinet or in this Court's conferences, even in an *ex officio* capacity. Unlike the Commission, which is a creature of statute empowered by Congress, both the President and this Court derive their fundamental authority directly from the Constitution. For example, while Congress has required the Commission to make public most of its deliberations in administering the Act,

[8] The Commission routinely deliberates in public session on such matters as proposed regulations, advisory opinions to be issued under 2 U.S.C. § 437f, and public financing determinations under 26 U.S.C. §§ 9005, 9007(b), 9036, and 9038(b).

see pp. 7-8, *supra*,[9] this Court has recognized that the President's privilege of confidentiality in discussions with his associates and advisors "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). *See* U.S. Const., Art. II, § 2.[10] Similarly, although this Court has concluded that Congress can create independent agencies performing executive functions and restrict the President's power to remove their members, *Morrison*, 487 U.S. at 687-691, it has noted that "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." *Id.* at 690.

The contrast between this Court's constitutional role and the Commission's statutory enforcement authority is even more pronounced, for the Commission's activities pose no "threat to the 'impartial and independent federal adjudication of claims within the judicial power of the United States.' " *Morrison*, 487 U.S. at 683 (quoting *Schor*, 478 U.S. at 850). The provision in Art. III, § 1 for lifetime tenure without diminution in compensation for federal judges demonstrates the Framers' particular concern that the federal judicial power be insulated from influence by the political branches. In contrast, the Commission here has performed only a civil prosecutorial

[9] "[T]he regulation and mandatory disclosure of documents in the possession of the Executive Branch . . . has never been considered invalid as an invasion of its autonomy." *Nixon v. Administrator of General Services*, 433 U.S. at 445 (citing, *inter alia*, the FOIA and the Sunshine Act).

[10] *See also Public Citizen*, 491 U.S. at 451-67 (narrowly construing the Federal Advisory Committee Act, 5 U.S.C. App. 2, §§ 1-15, to avoid constitutional concerns about interference with the President's confidential communications); *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2775-76 (1992) (Administrative Procedure Act); *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909-10 (D.C. Cir. 1993).

function; the Act reserves adjudication of whether Respondents violated the Act to an independent federal judge. 2 U.S.C. § 437g(a)(6).[11]

In sum, this is a highly fact-dependent area of constitutional law, in which the determinative issue is whether the particular statutory scheme at issue unduly "impede[s] the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." *Morrison*, 487 U.S. at 691. The *ex officio* members of the Commission present no threat to the ability of the President to perform his constitutional duties, and Congress could reasonably conclude that the institutional expertise of the Secretary and the Clerk is relevant to the substantive jurisdiction of the Federal Election Commission in a manner that would not be true for any other independent agency.[12] Although the composition of the Commission is unusual, "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta*, 488 U.S. at 385.

II. THE COMMISSION'S PAST ACTIONS SHOULD BE ACCORDED *DE FACTO* VALIDITY

1. The Solicitor General (Br. 27-28) and the Respondents (Br. 19-34) debate at length the extent to which this

[11] Even the Commission's adjudicative decisions are not final, but are subject to review by a federal court. *See* 26 U.S.C. §§ 9011(a), 9041(a).

[12] *See, e.g.*, 2 U.S.C. § 439a (generally prohibiting personal use of campaign funds, except for "ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office"); 2 U.S.C. § 432(g) (reports to be filed by candidates with the Secretary or the Clerk, and then forwarded to the Commission). *See also Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986) (distinguishing constituent communications of incumbent Congressman from campaign communications regulated by the Act); *FEC v. Wright*, 777 F. Supp. 525 (N.D. Tex. 1991) (overlap of former provision of the Act with internal House rules). *See also* FEC Br. 20-21 n.11.

Court's recent precedents permit prospective decisionmaking in appropriate cases. We believe the Solicitor General is correct but, as noted in our opening brief (p. 31 n.21), this case does not require the Court to resolve that issue.

As our opening brief makes clear, we have not asked the Court to issue a prospective decision in this case. Nor have we suggested that this Court should affirm the district court's judgment, as Respondents assert (Br. 18); since the merits of that decision were never reviewed by the court of appeals it is not even ripe for consideration here (FEC Br. 33). Instead, we have argued that, if the Court finds the *ex officio* provision unconstitutional, it should remand the case to the court of appeals with instructions to proceed to consider the merits of the allegations against Respondents only at the behest of a reformed Commission acting without *ex officio* members. While it is certainly understandable that Respondents would prefer to escape all liability for the serious violations of the Act found by the district court, they have failed to contravene the showing in our opening brief that this would be an adequate remedy for their narrowly focused constitutional claim, which would not sacrifice the public interest in the uninterrupted enforcement of the Act.

Respondents have found no authority requiring that relief on a constitutional claim go any further than necessary to protect a party's substantive rights from being prejudiced by the constitutional defect found. Even a criminal defendant who prevails on a constitutional claim not involving sufficiency of the evidence is not ordinarily entitled to dismissal of the charges against him, but only to a retrial free of the constitutional defect. *See, e.g., Bullington v. Missouri*, 451 U.S. 430, 442 (1981); *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988). Thus, in *Griffith v. Kentucky*, 479 U.S. 314 (1987), the case featured by Respondents (Br. 20-21) as establishing the

requirement of retroactive decisionmaking in criminal cases, the Court did not require the dismissal of the charges against the defendant, but remanded for further proceedings that resulted in a retrial. *See United States v. Brown*, 817 F.2d 674, 676 (10th Cir. 1987). In fact, if the Court finds a constitutional defect, but it is shown not to have affected the outcome of the trial, the defendant is not even entitled to have the conviction set aside. *See, e.g., Chapman v. California*, 386 U.S. 18, 22-24 (1967) (discussing "harmless-constitutional-error rule"); *Delaware v. Van Arsdall*, 475 U.S. 673, 680-84 (1986) (same).[13]

This shows that there is no merit in Respondents' insistence that any remedy short of dismissal of the charges against them in this civil suit would render the judgment nonretroactive. In fact, in *Harper v. Virginia Dep't of Taxation*, 113 S.Ct. 2510 (1993), the Court stated that it had engaged in retroactive decisionmaking by applying a new "rule of law" adopted in a previous decision to a second case that was then pending on appeal, 113 S.Ct. at 2517, even though the Court did not enter judgment for the petitioner because other legal rules might still be available that would limit the relief to be provided on remand, 113 S.Ct. at 2519-20. Thus, the Commission's argument in this case—that the Court should apply the

[13] It bears repeating in this regard that, as the Solicitor General noted (Br. 26), "Respondents in the present case do not quarrel with the manner in which the Commission processed their case" and "do not contend . . . that the presence of the Secretary and Clerk somehow tilted the Commission's proceedings in this case in a manner adverse to their interests." Respondents did not even object to the participation of the *ex officio* members while the administrative proceeding was still pending before the Commission. Since there is no claim before this Court that the judgment entered by the district court was not fairly reached, it is unnecessary to throw out this entire case in order to remedy Respondents' narrow claim that they cannot have a binding judgment entered against them in a civil law enforcement suit brought by a federal agency that includes *ex officio* members.

de facto validity doctrine of *Buckley v. Valeo*, 424 U.S. 1, 142 (1976), in fashioning the remedy for Respondents' constitutional claim—is entirely consistent with the retroactivity principles discussed in *Harper*.[14]

If a reformed Commission continued, in the absence of the *ex officio* members, to believe that the case has merit and should be pursued, any final judgment the courts may thereafter enter on the merits would be at the behest of an agency that satisfies all of Respondents' objections. Respondents' perception (Br. 40 n.24) that the voting Commissioners are not likely to view the merits of this case any differently even in the absence of the *ex officio* members does not make this relief meaningless. Instead, it merely supports our argument (FEC Br. 28-29) that the presence of the *ex officio* officers was always peripheral to the independent decisionmaking by the voting Commissioners, who have always been *de jure* officers of the United States. That fact makes this an even stronger case for according *de facto* validity to the Commission's prior actions than *Buckley* was, since in that case it was the voting Commissioners themselves whose presence on the Commission was found unconstitutional.

2. The short answer to Respondents' arguments that *de facto* validity cannot be accorded the Commission's past actions here either because of the nature of their constitutional claim (Br. 34-38) or because the *de facto*

[14] *Harper* would not even require that the new "rule of law" adopted by the court of appeals, that the Commission cannot include *ex officio* members, be applied retroactively to the administrative investigation completed by the Commission prior to the filing of this lawsuit. *Harper* only requires retroactive application in "cases still open on direct review," 113 S.Ct. at 2517. This lawsuit is a *de novo* law enforcement suit, which does not involve judicial review of the administrative investigation that preceded it. *See generally, Chandler v. Roudebush*, 425 U.S. 840, 852-54 (1976) (discussing difference between *de novo* judicial action and review of agency decision). Since the administrative proceeding is not "still open on direct review," *Harper* would only require application of a ruling on the *ex officio* provision to the Commission's actions in this litigation.

officer rationale cannot be used in fashioning a remedy (Br. 38-40), is that the Court has already found that remedy proper in *Buckley v. Valeo*, 424 U.S. at 142. In that case this Court ruled that the Commission's original structure violated separation of powers, but it fashioned a remedy that accorded *de facto* validity to the Commission's prior actions.[15]

The *de facto* officer rationale obviously has no application to cases such as *INS v. Chadha*, 462 U.S. 919 (1983), *Harper*, 113 S.Ct. 2510 (1993), or *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in which the substantive legal effect of particular actions, rather than the validity of an agency or official, is at issue. Indeed, in *Buckley* itself the Court did not purport to make its substantive constitutional rulings prospective, but recognized as valid only actions of the Commission to enforce "those provisions [of the Act] the Court sustains." 424 U.S. at 143. Since *Buckley*, the courts have continued to follow the *de facto* validity rule in fashioning remedies for constitutional decisions "invalidating governmental bodies." *Metropolitan Washington Airports Authority Professional Fire Fighters Ass'n Local 3217 v. United States*, 959 F.2d 297, 305 (D.C. Cir. 1992).[16] *See also*

[15] The *Buckley* decision was, as the court of appeals recognized (Pet. App. 17a), based on the *de facto* officer rationale rather than on notions of prospective decisionmaking. The Court explicitly relied upon decisions recognizing *de facto* validity of "legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan," 424 U.S. at 142, and did not even mention the test for prospective decisionmaking set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Respondents' contention (Br. 29) that the *Buckley* decision was not intended to validate Commission enforcement actions is belied by the Court's explicit extension of its ruling to permit the Commission to continue operating *de facto* for 30 days to enable Congress to reconstitute the Commission "without interrupting enforcement of the provisions [of the Act] the Court sustains," 424 U.S. at 143.

[16] *Local 3217* makes clear, 959 F.2d at 304, that contrary to Respondents' assertion (Br. 33-34, 39), this Court's decision in *Metropolitan Washington*, 501 U.S. 252 (1991), did not reverse the

In re Application of the President's Comm'n on Organized Crime, 763 F.2d 1191, 1201-02 (11th Cir. 1985) (Fay, J.); *Hechinger v. Metropolitan Washington Airports Authority*, 1994 WL 520018, *10 (D.C. Cir., Sept. 27, 1994).

Respondents' argument (Br. 38-42) that the *de facto* officer doctrine is inapplicable where there is no *de jure* office to be filled has no relevance to the facts of this case. Respondents have not contested the finding of the court of appeals (Pet. App. 16a-17a) that the *ex officio* provision is severable from the remainder of the statute, so that the Commission can continue to function as a federal agency with only the six members appointed by the President, without any need for legislative action. The federal offices filled by the six voting Commissioners have been *de jure* offices all along, and the individuals who performed the functions of those offices were *de jure* officers at every stage of this case. Nor did the decision of the court of appeals invalidate the Commission as an institution; it only required a modification of the structure of the agency, which otherwise continues to exist as a *de jure* institution of government. In short, since the constitutional defect found by the court of appeals was not in the creation of the Commission or in the appointment of the voting Commissioners, but only in the possibility that agents of Congress might improperly influence the *de jure* executive decisionmakers, Respondents' argument has no merit.[17]

application of *de facto* validity pursuant to *Buckley* by the court of appeals in that case.

[17] In *Norton v. Shelby County*, 118 U.S. 425 (1886), upon which Respondents primarily rely (Br. 34-38), the Court explicitly recognized that the *de facto* officer doctrine applies in cases where " 'there was a want of power in the . . . appointing body' " or where an official was " 'appoint[ed] by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.' " *Id.* at 446 (citation omitted). While none of the agency actions implicated here was taken by the *ex officio* members, Congress's allegedly

3. Respondents argue (Br. 40-42) that the Restatement (Second) of Agency would not permit a reformed Commission to ratify its prior actions. As our prior discussion makes clear, the *de facto* validity doctrine of *Buckley* would recognize the Commission's prior acts as valid without any need for such ratification, and Respondents would receive adequate relief on their claim if the Commission is reformed and then has an opportunity to decide, in the absence of the *ex officio* members, whether or not the merits of the case justify continuing to pursue it. *See* FEC Br. at 31 (discussing Fed. R. Civ. P. 25(d)). *See also, e.g., Irwin v. Wright*, 258 U.S. 219, 224-25 (1922); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947) (applying Fed. R. Civ. P. 25); *Hoptowit v. Spellman*, 753 F.2d 779, 781-82 (9th Cir. 1985).

If the Court were to conclude that ratification of the Commission's prior actions is necessary, however, there is nothing in the Restatement (Second) of Agency that would prevent the Court from so ruling. Respondents' argument rests on the fiction that a reformed Commission would be an entirely different entity, analogous to two unrelated individuals. We have shown above, however, that under the decision of the court of appeals a reformed Commission is an ongoing entity, whose actions continue to be determined by the same six *de jure* officers as before, but no longer in the presence of agents of the Congress. Thus, rather than ratifying the actions of strangers, the reformed Commission would be ratifying its own prior decisions—decisions that these *same officers* would have been lawfully authorized to make before in the absence of the Secretary and the Clerk. None of Respondents' arguments against ratification is remotely applicable to such a situation.

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unconstitutional designation of its own agents to serve as *ex officio* members of the Commission would fall into these categories even if they had been.

III. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED

Respondents question (Br. 6, 9-11) whether the Commission's petition for writ of certiorari was timely filed. They acknowledge (Br. 9) that the Commission filed the petition within the 90-day period specified by 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.1, but they suggest that the submission was unauthorized and thus cannot be deemed a timely filing for jurisdictional purposes. As the Commission explained in the brief it filed on this issue on May 31, 1994, however, Congress granted the nonpartisan Commission complete independent civil litigating authority as part of the reforms it enacted in the wake of the Watergate scandal. The Commission properly exercised that authority in filing the petition in this case.[18]

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[18] Although the Commission did not request the Solicitor General to do so, he authorized the Commission's General Counsel to litigate this case in this Court. Contrary to Respondents' arguments (Br. 9-10), 28 U.S.C. § 518(a) and 28 C.F.R. § 0.20 neither impose any temporal limitation on the Solicitor General's plenary authority to authorize others to represent the government in this Court, nor incorporate by reference the views on the general law of agency set out in the Restatement (Second) of Agency. *Cf. United States v. Winston*, 170 U.S. 522, 525 (1898). Finally, since the petition was timely filed in this case, there is no basis for Respondents' concern (Br. 10 n.5) that this case could empower the Solicitor General to authorize petitions to be filed out of time.

CONCLUSION

For the reasons stated above and in the Commission's initial brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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